Chang Siew Lan (f) v Loh Chooi Teng (practising as Messrs CT Loh & Co a firm)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08(F)-107 OF 2009(J)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), GOPAL SRI RAM AND MOHD GHAZALI FCJJ
8 OCTOBER 2009

Tort — Negligence — Professional negligence — Misappropriation of money by vendor's solicitor — Action against purchaser's solicitor — Whether purchaser's solicitor ought to have foreseen misappropriation by vendor's solicitor — Whether purchaser's solicitor acted in accordance to agreement

The application for leave in the court involved a question of fact. The respondent acted as the applicant purchaser's solicitor in a purchase of a piece of property which was charged to Delta Finance Bhd ('Delta Finance') and a sum of RM248,748.92 remained due and payable by the vendors to Delta Finance. The applicant paid the vendors the deposit pursuant to the agreement and subsequently the respondent released the balance of the purchase price to the vendors' solicitor. In so doing the respondent acted in accordance with the arrangement between the parties and upon the vendors' solicitor's undertaking to utilise the balance of the purchase price to redeem the subject property from Delta Finance. However, the vendors' solicitor misappropriated the monies and presented a cheque to Delta Finance which was dishonoured. The applicant therefore brought an action, inter alia, against the respondent for negligence, on the grounds that the respondent ought to have reasonably foreseen that the vendors' solicitor might misappropriate the balance of the purchase price and should not have made the cheque out in favour of the defalcating solicitor. However, the respondent asserted that she had, in all the circumstances of the case, acted with reasonable care. The High Court and the Court of Appeal found in favour of the respondent and hence this application by the appellant.

Held, dismissing the application with no order as to costs:

Whether a defendant had acted negligently in given circumstances is a pure question of fact. On the facts of the present case, the danger of an embezzler acting as the vendors' solicitor did not enter upon the scene in view of the express directions in the sale and purchase agreement. It was therefore not

negligence for the respondent to do what she did, namely, to comply with the duty imposed on her by the terms of the sale and purchase agreement. To have expected her to have done more in the circumstances of the present case would have required her to have guarded against fantastic possibilities (see paras 5–6).

Observation:

Whilst it may not be negligence for a purchaser's solicitor to act in accordance with the terms of an agreement stipulating the role that he or she is required to play in the transaction, it may well be negligent (depending on the particular circumstances of the case) not to advice a purchaser to insist on inserting a clause in a sale and purchase agreement in circumstances as the present where there is an outstanding charge, requiring a separate payment directly to the chargee in order to effect a redemption of the subject property. It would be advisable and be in accord with acceptable and careful conveyancing practice to do so having regard to the widespread misappropriation of clients' moneys by solicitors of which we read in the national newspapers at regular intervals. Since protecting one's client's money is the overriding consideration in conveyancing matters, ensuring that the redemption sum reaches a chargee without the intervention of the other side's solicitor may be the answer to avoid charges of negligent practice.

[Bahasa Malaysia summary

Permohonan untuk kebenaran dalam mahkamah ini melibatkan persoalan fakta. Responden, yang merupakan peguam cara pemohon pembeli dalam pembelian satu hartanah yang digadaikan kepada Delta Finance Bhd ('Delta Finance') dan sejumlah RM248,748.92 masih terakru dan kena bayar oleh penjual kepada Delta Finance. Pemohon membayar penjual-penjual deposit berikutan dengan perjanjian tersebut dan kemudiannya responden mengeluarkan baki harga belian kepada peguam cara penjual-penjual. Oleh yang sedemikian, responden bertindak selaras dengan pengaturan antara pihak-pihak dan menurut akujanji peguam cara penjual-penjual untuk menggunakan baki harga belian untuk menebus hartanah tersebut daripada Delta Finance. Walau bagaimanapun, peguam cara penjual-penjual telah menyalahgunakan wang tersebut dan memberikan Delta Finance cek yang tak laku. Pemohon oleh itu mengambil tindakan, antara lain, terhadap responden atas kecuaian, atas dasar bahawa responden seharusnya secara munasabah menjangka bahawa peguam cara penjual-penjual berkemungkinan akan menyalahgunakan baki harga belian tersebut dan tidak seharusnya mengeluarkan cek kepada peguam cara yang telah menggelapkan wang tersebut. Tetapi, responden menegaskan bahawa dia, dalam semua keadaan kes, telah mengambil langkah berjaga-jaga dengan sewajarnya.

Mahkamah Tinggi dan Mahkamah Rayuan telah memutuskan memihak kepada responden, justeru, permohonan ini oleh perayu.

Diputuskan, menolak permohonan tanpa perintah untuk kos:

Sama ada defendan telah bertindak dengan cuai dalam keadaan-keadaan ini merupakan persoalan fakta semata-mata. Menurut fakta-fakta kes ini, bahaya bagi seorang penggelap wang yang bertindak sebagai peguam cara penjual tiada sangkut-paut dalam arahan-arahan nyata dalam perjanjian jual beli tersebut. Maka, responden tidak cuai apabila melakukan apa yang telah dilakukannya, iaitu, memenuhi kewajipan yang telah dipertanggungjawabkan kepadanya oleh terma-terma perjanjian jual beli tersebut. Mengharapkan responden melakukan lebih daripada itu dalam keadaan kes ini, tentu memerlukannya berjaga-jaga atas kemungkinan yang tidak masuk akal (lihat perenggan 5–6).

Pemerhatian:

Walaupun bukanlah satu kecuaian bagi peguam cara pembeli bertindak menurut terma-terma perjanjian yang menetapkan tugasan yang perlu dalam transaksi tersebut, kemungkinan ianya satu kecuaian (bergantung kepada keadaan-keadaan tertentu dalam kes tersebut) apabila tidak menasihatkan pembeli untuk mendesak memasukkan klausa dalam perjanjian jual beli dalam keadaan-keadaan kes ini apabila wujudnya gadaian yang belum dijelaskan, yang memerlukan bayaran berasingan, terus kepada penggadai bagi menebus semula hartanah tersebut. Adalah lebih bijak dan menurut amalan cara pindahhak yang diterima pakai dan cermat untuk berbuat demikian berikutan dengan kejadian penyalahgunaan wang anak guam oleh peguam cara-peguam cara yang berleluasa kini seperti yang sering kita baca di dada-dada akhbar. Memandangkan melindungi wang anak guam lebih penting dalam hal cara pindahhak, memastikan bahawa wang penebusan sampai terus kepada penggadai tanpa campur tangan oleh peguam cara pihak yang satu lagi mungkin merupakan jawapan untuk mengelakkan dakwaan-dakwaan amalan kecuaian.]

Notes

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1133–1206.

Cases referred to

Edward Wong Finance Co Ltd v Johnson Stokes & Master [1984] 1 AC 296, PC (distd)

Fardon v Harcourt-Rivington (1932) 146 LT 391, HL (refd)

Wong Kiong Hung & Anor v Chang Siew Lan (F) [2009] 4 MLJ 183; [2009] 3 CLJ 751, CA (folld)

A **Appeal from**: Civil Appeal No J-02–148 of 2003 (Court of Appeal, Putrajaya)

K Kirubakaran (R Jayabalan with him) (John Ang & Jega) for the appellant. Chok Chin You (Yeo, Tan, Hoon & Tee) for the respondent.

B **Gopal Sri Ram FCJ (delivering judgment of the court):**

[1] We refused leave to appeal in this case because the questions that lie at the heart of this matter are really questions of fact. However, there is a point C of practice relevant to the conveyancing Bar on which the views of this court may be of assistance. It is for that reason that this judgment is produced, despite the general policy of this court not to give reasons when granting or refusing leave.

D **[2]** The applicant is the purchaser of a piece of property in Johor of which the first and second defendants in the proceedings before the High Court were the vendors. The instant respondent acted as the applicant's solicitor in the transaction. At the material time, the subject property was charged to E Delta Finance Bhd and a sum of RM248,748.92 remained due and payable by the vendors to Delta Finance. Under the terms of the agreement, the vendors were to deliver to the applicant a valid and registrable title free of incumbrances. The only incumbrance in the contemplation of the parties was the charge in favour of Delta Finance. The applicant paid the vendors the F deposit stipulated in the agreement. Later, the respondent solicitor released the balance of the purchase price to the vendors' solicitor. In so doing she acted in accordance with the arrangement between the parties and upon the vendors' solicitor's undertaking to utilise the balance of the purchase price to redeem the subject property from Delta Finance. As it happened, the vendors' G solicitor misappropriated the monies and presented a cheque to Delta Finance which was dishonoured. The applicant then brought an action, inter alia, against the respondent for negligence, the substance of the charge being that the respondent ought to have reasonably foreseen that the vendors' solicitor may misappropriate the balance of the purchase price. She ought not H therefore to have made the cheque out in favour of the defalcating solicitor. In the High Court, there was no controversy that the respondent did owe the applicant a duty of care to ensure that the applicant's interests in the transaction in question were sufficiently protected. What was asserted by the instant respondent was that she had, in all the circumstances of the case, acted I with reasonable care. After a careful consideration of the evidence the learned trial judge found for the respondent. Dissatisfied, the applicant appealed to the Court of Appeal.

[3] In support of her case in both courts below, the applicant placed much reliance on *Edward Wong Finance Co Ltd v Johnson Stokes & Master* [1984] 1 AC 296, a decision of the Privy Council on an appeal from Hong Kong. Low Hop Bing JCA who delivered the judgment of the Court of Appeal (reported in [2009] 4 MLJ 183; [2009] 3 CLJ 751) said this of that case:

> [33] *Edward Wong Finance Co Ltd v Johnson Stokes & Master (a firm)* [1984] 1 AC 296 (PC), which the purchaser herein relied on heavily, is concerned with the standard of care owed by a solicitor to his client in relation to mortgage of property pursuant to the conveyancing practice prevalent in Hong Kong. The advice of the Privy Council was delivered in the context of the tort of negligence arising from the solicitors' failure to exercise due care, skill and judgment in the performance of their duty to take reasonable steps to protect their client's interest. Conspicuously, the facts before the Privy Council are somewhat dissimilar.
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> [34] The provisions of cll 2, 4 and 15 which fall to be considered herein, are not within the purview of consideration by the Privy Council. These contractual provisions are crucial for consideration by this court, especially in relation to the issues of negligence or breach of contractual duty or both. Further, the purchaser herein had already obtained judgment against the vendors. In the circumstances, with the utmost respect, the factual matrix in *Edward Wong Finance Co Ltd*, is readily distinguishable from the facts before this court.
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> [35] In Malaysia, as alluded to above, where a solicitor accepted a sum of money in the capacity of the solicitor for his client, so as to utilise it to redeem the property, but had instead absconded with it, the client was ordered to bear the loss: per Wan Hamzah J (later SCJ) in *Kuldip Singh & Anor*.
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> [36] The contractual duty of the purchaser's solicitor is to be found in cll 2, 4 and 15 of the SPA. Clause 15 has been referred to and considered earlier in this judgment.
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> [38] Read conjunctively, cll 2, 4 and 15 do not impose any contractual obligation or duty on the purchaser's solicitor to effect payment of the balance purchase price to the chargee directly. It is abundantly clear that the payment of the balance purchase price is to be made to the vendors' solicitor and at the office of the vendors' solicitor. The purchaser's solicitor had complied with these clauses.
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> [39] In the process of effecting payment of the balance purchase price by the purchaser's solicitor to the vendors' solicitor pursuant to the provisions of the SPA, there was no evidence of any wrongful act or

omission on the part of the purchaser's solicitor. On the facts, no negligence can be imputed to the purchaser's solicitor. The facts also do not reveal any conflict of interest. The balance purchase price was actually released to the person to whom it was intended ie the vendors' solicitor who was specifically appointed by the vendors in the SPA. There is nothing in the agreed facts to render the disappearance of the vendors' solicitor reasonably foreseeable.

[40] The purchaser's solicitor should not be made liable for the wrongful act of the vendors' solicitor. It was the vendor's solicitor who had failed to honour his undertaking. It was the vendor's solicitor who had absconded with the balance purchase price.

[4] With respect, we agree with the views expressed by the Court of Appeal in the above quoted passage. Unlike *Edward Wong Finance Co Ltd v Johnson Stokes & Master*, where the duty of the defendant solicitor was at large and hence depended for its scope on the prevailing conveyancing practice in Hong Kong, in the present instance the applicant had, by way of cll 2, 4 and 15 of the agreement in question, expressly instructed the respondent solicitor to act in a specific manner. Had she acted in a different manner, the vendors and the applicant herself may have been entitled to allege a departure from the express terms of the contract.

[5] Whether a defendant has acted negligently in given circumstances is a pure question of fact. As Lord Dunedin said in *Fardon v Harcourt-Rivington* (1932) 146 LT 391 at p 392:

> If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions... In other words, people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.

[6] On the facts of the present case, we find ourselves in agreement with learned counsel for the respondent that the danger of an embezzler acting as the vendors' solicitor did not enter upon the scene in view of the express directions in the sale and purchase agreement. It was therefore not negligence for the respondent to do what she did, namely, to comply with the duty imposed on her by the terms of the sale and purchase agreement. To have expected her to have done more in the circumstances of the present case would have required her to have guarded against fantastic possibilities.

[7] Before we conclude there is a caveat which we would add for members of the conveyancing Bar. Whilst it may not be negligence for a purchaser's solicitor to act in accordance with the terms of an agreement stipulating the role that he or she is required to play in the transaction, it may well be negligent (depending on the particular circumstances of the case) not to advice a purchaser to insist on inserting a clause in a sale and purchase agreement in circumstances as the present where there is an outstanding charge, requiring a separate payment directly to the chargee in order to effect a redemption of the subject property. It would be advisable and be in accord with acceptable and careful conveyancing practice to do so having regard to the widespread misappropriation of clients' moneys by solicitors of which we read in the National newspapers at regular intervals. Since protecting one's client's money is the overriding consideration in conveyancing matters, ensuring that the redemption sum reaches a chargee without the intervention of the other side's solicitor may be the answer to avoid charges of negligent practice.

[8] Since the duty contended for by the applicant was freely admitted by the respondent, what remained was only the question of fact whether there was negligence here. And, in accordance with settled law, this court does not grant leave on issues of fact. The application was accordingly dismissed. Having regard to the very special circumstances of this case, we made no order as to costs.

Application dismissed with no order as to costs.

Reported by M Sivabarathi